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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 31700 (Sub-No. 13)

CANADIAN PACIFIC LIMITED, ET AL.--PURCHASE AND
TRACKAGE RIGHTS--DELAWARE & HUDSON RAILWAY COMPANY

(ARBITRATION REVIEW)

Decided: November 6, 1998

This proceeding involves appeals by the American Train Dispatchers Department of the International Brotherhood of Locomotive Engineers (Train Dispatchers) of an arbitrator's decisions: (1) approving the transfer by Canadian Pacific Railway Company (Canadian Pacific) of five Delaware & Hudson Railway Company (Delaware & Hudson)¹ dispatch positions from Milwaukee, WI, to Montreal, Quebec, Canada; and (2) imposing an implementing agreement to effectuate the transfer.² By petition filed October 23, 1997, the Train Dispatchers asked that the Board review and set aside the arbitrator's decisions.

In a decision served June 16, 1998, the effectiveness of the arbitral awards and orders was stayed pending Board action on the Train Dispatchers' appeals. By decision served September 18, 1998, we declined to review the arbitrator's decisions. The prior stay was scheduled to expire on October 18, 1998, the effective date of the Board's September 18 decision.

By a motion filed October 15, 1998, under 49 CFR 1115.5, the Train Dispatchers request that the Board extend the stay pending judicial review of the September 18 decision. By a decision served October 16, 1998, the effectiveness of the September 18 decision was stayed for 20 days, until November 7, 1998, to permit consideration of the Train Dispatchers' motion and any reply from the carriers. The carriers were directed to reply to the motion on or before October 21, 1998.

¹ Canadian Pacific and Delaware & Hudson will be collectively referred to as "the carriers."

² The awards resulted from arbitration between the parties conducted pursuant to Article 1, section 4, of the protective conditions set out in New York Dock Ry.-Control-Brooklyn East. Dist., 360 I.C.C. 60 (1979), aff'd sub nom. New York Dock Ry. v. U.S., 609 F.2d 83 (2d Cir. 1979) (New York Dock).

They subsequently filed a reply on that date.³ The motion for stay pending judicial review will now be denied.

DISCUSSION AND CONCLUSIONS

The standards governing disposition of a petition for stay are: (1) whether petitioner is likely to prevail on the merits on appeal; (2) whether petitioner will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay is in the public interest. Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); and Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921 (D.C. Cir. 1958). A stay of an agency action pending judicial review is an extraordinary action that should not be taken except in the most unusual situations. Middlewest Motor Freight Bureau v. United States, 443 F.2d 212, 242 (8th Cir. 1970). The party seeking stay or injunctive relief carries the burden of persuasion on all of the elements required for extraordinary relief such as a stay. Canal Authority of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974). Because this showing is difficult, such relief is rarely granted.

The Train Dispatchers have not addressed the stay criteria per se, and more importantly they have not met their evidentiary burden. A review of their pleadings, the carriers' reply, and the record leads to the conclusion that the sought relief has not been shown to be warranted. Accordingly, the request for stay will be denied.

1. Likelihood of success on the merits. In the September 18 decision, the Board applied the standard for review of arbitrators' decisions⁴ and concluded that Board review had not been shown to be justified. In addition, the Board considered safety issues raised by the Train Dispatchers. The Board found that, in view of the carriers' filings with the Federal Railroad Administration (FRA) and in view of the carriers' representations, the Train Dispatchers' safety arguments did not furnish a legal basis for reviewing the arbitrator's decisions. Here the Train Dispatchers simply have reiterated previous arguments that have already been considered and rejected by the Board. The Train Dispatchers have not demonstrated that the Board acted arbitrarily or capriciously or otherwise erred in applying the governing standards and disposing of the issues raised. Accordingly,

³ On October 28, 1998, the Train Dispatchers filed a "Motion for Leave to File Response to Carriers' Reply...", accompanied by the response, and the carriers filed in opposition to the motion on November 4, 1998. Although the Train Dispatchers' pleading amounts to an improper reply to a reply under 49 CFR 1104.13(c), it will be accepted and considered because no party will be prejudiced by such action.

⁴ The standard for review of arbitration decisions is set forth in the Interstate Commerce Commission's decision in Chicago & North Western Tptn. Co.-Abandonment, 3 I.C.C.2d 729 (1987), aff'd sub nom. International Broth. of Elec. Workers v. I.C.C., 862 F.2d 330 (D.C. Cir. 1988).

petitioners have not shown that they are likely to succeed on the merits of any appeal of the Board's decision.

2. Whether the petitioner will suffer irreparable harm in the absence of a stay. The Train Dispatchers have not shown that employees would be irreparably harmed in the event the carriers are allowed to proceed with their transfer of dispatch positions from Milwaukee to Montreal. Petitioners assert that, in the absence of a further stay, the employees represented by the Train Dispatchers will be irreparably harmed. In response, the carriers point out that the implementing agreement affords employees holding regular dispatching assignments at Milwaukee the right to elect to follow their work to Montreal or to exercise their seniority to fill dispatching positions in Minneapolis, MN. In either case, the carriers assert, the employees will receive relocation allowances and all applicable New York Dock protective benefits. The carriers add that employees who choose to relocate to Minneapolis will remain in the same bargaining unit, will retain their seniority, and will work under the terms of their existing collective bargaining agreement. Finally, the carriers recognize the possibility that, if the Train Dispatchers were to prevail on the merits of their appeal, the carriers might be required to restore the status quo by relocating the dispatching work back to Milwaukee. On this record, the Train Dispatchers have failed to meet their evidentiary burden vis-a-vis this element.

3. Whether a stay will substantially harm other interested parties. The carriers assert that they already have been delayed in their efforts to realize the operating cost savings and efficiencies that the dispatching coordination and closing of the Milwaukee dispatching center will generate. The carriers state that other work previously performed at Milwaukee was relocated more than a year ago, and that they have been required to maintain a leased facility solely to house the Delaware & Hudson train dispatching work pending implementation of the involved transfers and coordination of work. This element weighs in favor of denial of the stay request.

4. Whether a stay is in the public interest. The Train Dispatchers assert that the public interest would be irreparably harmed if the carriers were permitted to proceed with their transfers. As earlier indicated, the Board has addressed the Train Dispatchers' safety arguments and found that they do not furnish a legal basis for a Board review of the arbitrator's decisions. Moreover, the carriers state that their intended coordination of operations will yield public transportation benefits in the form of more efficient dispatching operations. They add that such efficiencies, in turn, will yield benefits that are passed on to shippers in the form of lower rates. To continue the stay, the carriers contend, would postpone those benefits. On balance, this element also weighs in favor of denial of the stay request.

The Train Dispatchers' response adds nothing substantive in terms of their evidentiary burden under the stay criteria. Accordingly, because there remains no basis for the Board to extend the stay in this proceeding, such relief will not be granted.

For the reasons discussed above, the relief sought by the Train Dispatchers will be denied.

It is ordered:

1. The Train Dispatchers' response to the carriers' reply is accepted for filing.
2. The motion for stay pending judicial review is denied.
3. This decision is effective on its service date.

By the Board, Linda J. Morgan, Chairman.

Vernon A. Williams
Secretary